Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

NO. 83-506

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

V.

CONRADO U. VELA,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE CONTROLLING ISSUE OF DEFENSE COUNSEL'S INEFFECTIVENESS WAS FAIRLY PRESENTED TO, AND FULLY CONSIDERED BY, THE STATE HABEAS COURT SATISFYING THE REQUIREMENT OF EXHAUSTION OF STATE REMEDIES?

II. WHETHER THE PROCEDURAL DEFAULT DOCTRINE PROHIBITS A STATE PRISONER FROM URGING HIS DEFENSE COUNSEL WAS INEFFECTIVE, IN PART, BECAUSE COUNSEL'S FAILURE TO OBJECT ADEQUATELY DID NOT PRESERVE THE ERROR FOR STATE APPEAL AND EXPOSED THE SENTENCING JURY TO "COMPLETELY IRRELEVANT, IMMATERIAL, AND PREJUDICIAL" EVIDENCE AND ARGUMENT CONCERNING THE GOOD CHARACTER OF THE VICTIM?

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Conrado U. Vela, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit, in Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), rehearing and en banc rehearing denied, _____ F.2d _____ (No. 82-1236, filed August 23, 1983).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On October 2, 1973, in the Criminal District Court No. 5 of Dallas County, Texas, Respondent pled guilty to murder and requested that the jury assess punishment (Tr. 5, 10, 17; SF

4-6; Wr. tr. 3, 5).[1] In the somewhat peculiar Texas procedure, the jury had the option of finding Respondent guilty of murder with malice aforethought, which carried a punishment of life or any term of years of imprisonment not less than two years, or murder without malice aforethought, which carried a punishment of not less than two years nor more than five years imprisonment. After hearing evidence and argument, the jury found Respondent guilty of murder with malice and assessed punishment at 99 years confinement (Tr. 15; SF 271-72). Represented by his trial counsel, Respondent took an unsuccessful direct appeal to the Texas Court of Criminal Appeals. Vela v. State, 516 S.W.2d 176 (Tex. Crim. App. 1974). On direct appeal, the state court ruled on each asserted error in much the same way: because the Respondent's attorney had failed to object properly to the prejudicial testimony, other similar testimony, or the prosecutor's improper argument, none of the errors was preserved for review.

Appearing pro se, Respondent applied for state collateral relief on April 10, 1980 (Wr. tr. 9; ROA 5). His petition set out in great detail the factual and legal argument that Respondent had been denied his constitutional right to effective assistance of counsel (Wr. tr. 9-14). The Criminal District Court, the convicting court, made findings of fact and conclusions of law without a hearing and recommended the denial

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[1] Record references are as follows. "ROA" refers to the Record on Appeal of Petitioner's federal writ application, District Court Docket Number CA3-81-2022. "Tr." refers to the document transcript from Petitioner's state court prosecution, State Trial Court Cause Number C73-7226-JL, State Appellate Court Cause Number 49, 203. "SF" refers to the upper right page numbers of the transcription of the statement of facts of the state court trial. "Writ tr." refers to the document transcript of the state habeas proceeding, State Trial Court Cause Number W-80-50017-L and State Appellate Court Cause Number 9209.

of all relief (Wr. tr. 20-23). The Texas Court of Criminal Appeals denied the application without written order on June 4, 1980 (Wr. tr. cover).

On November 12, 1981, Respondent pro se applied for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 (Supp. V 1981) in the United States District Court for the Northern District of Texas, Dallas Division (ROA 1-11). Respondent's sole contention was the ground unsuccessfully urged previously in his state habeas corpus proceeding: the denial of his constitutional right to effective assistance of counsel at his 1973 trial. The District Judge adopted the magistrate's findings, conclusions, and recommendation and further refused and dismissed Respondent's application in an order dated April 8, 1983 (ROA 32-33) (Supplemental Appendices C, D, & E). A certificate of probable cause and a timely notice of appeal were filed (ROA 34, 36). After Respondent filed his pro se brief and Petitioner filed a brief in response, the United States Court of Appeals for the Fifth Circuit appointed counsel for Respondent and requested further briefing. Appointed counsel filed a supplemental brief on the same ineffectiveness claim which was raised in the earlier pro se filings.

On July 5, 1983, a panel of the Court of Appeals reversed the judgment of the District Court and, consistent with Texas sentencing law, remanded the cause "with instructions to grant the writ of habeas corpus unless the State elects within a reasonable time to retry Vela" Vela v. Estelle, 708 F.2d at 966 (Petition for Writ of Certiorari Appendix B at 30-31). On August 23, 1983, the Court of Appeals denied Petitioner's Suggestion of Rehearing En Banc; no member of the panel or judge in regular active service on the court even requested a poll (Petition for Writ of Certiorari Appendix A at 1). See Fed. R. App. P. 35; 5th Cir. R. 16. On September 12, 1983, the

Court of Appeals denied Respondent's request for an indefinite stay of the mandate and entered an order for a conditional stay pending this Court's action on the instant petition. Vela v. Estelle, No. 82-1236 (5th Cir. filed Sept. 12, 1983).

B. Statement of Facts

Petitioner's Statement of Facts is a fairly accurate account of the tragic events surrounding the July 1, 1973, murder (Petition for Writ of Certiorari at 6-7). Respondent never denied the crime and pled guilty to the indictment (Tr. 1, 5, 10, 17; SF 4-6; Wr. tr. 1-5). The only issue which remained for the jury was how much punishment was deserved. The only factual issue raised in this Court concerns exhaustion, and the following facts summarize Respondent's exhaustion of state remedies.

Any concern for exhaustion must consider the context of the state habeas proceeding. Respondent's pro se "Original Post Conviction Petition for a Writ of Habeas Corpus" filed in the Criminal District Court No. 5 of Dallas County raised the ineffectiveness of counsel claim based on the effect on the entire sentencing proceeding from defense counsel's incompetence (Wr. tr. 9-14). Respondent relied on all the "papers, transcripts, statement of the facts and . . . other records of the proceedings" (Wr. tr. 14). The Criminal District Court, the first state habeas court, went beyond the application to make findings of fact and conclusions of law without a hearing, recommending the denial of all relief, Trial Court Number W-80-50017-L (Wr. tr. 20-23). In its recommendation the Criminal District Court evaluated defense counsel's effectiveness on the entire record (Wr. tr. 20). The Criminal District Court rejected the approach of isolating particular defense counsel errors and reviewed defense counsel's performance in its entirety and in context. Even without the

prompting of any response to the state court application, the Criminal District Court went beyond the application and relied on particular positive aspects of defense counsel's performance. In recommending the denial of the application, the Criminal District Court noted defense counsel had made objections, argued to the jury, pursued the appeal, and "performed numerous other functions of a competent and effective trial counsel" (Wr. tr. 21). The transcript and all the papers in the case, along with the convicting court's findings and order, were transmitted to the Texas Court of Criminal Appeals (Wr. tr. 22). See Tex. Crim. Proc. Code Ann. art. 11.07 (Vernon 1979). The Texas Court of Criminal Appeals denied the application without a written order, apparently adopting the findings and recommendation (Wr. tr. cover). Thus, when the state courts considered and denied the state application, each went beyond the four corners of the state application to consider defense counsel's ineffectiveness on the trial record as a whole and each relied on specific examples of argued effectiveness in disposing of Respondent's sixth and fourteenth amendments claim. The federal habeas corpus proceedings followed at which the same claim of ineffective assistance of counsel was considered.

SUMMARY OF ARGUMENT

Petitioner's request for a writ of certiorari is typical of the genre. Petitioner exaggerates the Court of Appeals holding and overstates the importance of the decision below. Here, the state habeas court expressly stated it had reviewed the entire record under a totality-of-the-circumstances analysis of defense counsel's ineffectiveness. The Court of Appeals accepted this as true in finding exhaustion. Thus, the controlling issue of defense counsel's ineffectiveness was fairly presented to, and fully considered by, the state habeas

court. Respondent exhausted the state court remedy.

The doctrine of procedural default has no application here. Since losing on the issue on direct state court appeal, Respondent has never launched an admissibility challenge based on state evidence law, the defaulted issue. Instead, before the state and federal habeas courts Respondent has raised the single issue of ineffective assistance of counsel. Despite Petitioner's best effort to recast the issue, the procedural default doctrine cannot supplant the constitutional guarantee of the effective assistance of counsel.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE CONTROLLING ISSUE OF DEFENSE COUNSEL'S INEFFECTIVENESS WAS FAIRLY PRESENTED TO, AND FULLY CONSIDERED BY, THE STATE HABEAS COURT, SATISFYING THE REQUIREMENT OF EXHAUSTION OF STATE REMEDIES

Petitioner suggests that the holding below would require that a state habeas court "comb the entire record for any errors of counsel" once an ineffectiveness claim was made and, furthermore, would create a presumption that every conceivable counsel error was considered (Petition for Writ of Certiorari at 11). In some future appeal, Petitioner will not likely so overstate the holding, when appearing as an advocate against issuing the writ. Nor will the Court of Appeals exaggerate the holding in this case.[2] The true holding is evident

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[2] To date, the Court of Appeals has used the Vela v. Estelle holding only once, to reaffirm the entitlement to counsel reasonably likely to render and rendering effective assistance of counsel. Martin v. Maggio, 711 F.2d 1273, 1279 (5th Cir. 1983) (citing Vela v. Estelle, 708 F.2d 954, 961 (5th Cir. 1983)). In more than three months since the decision, this has been the only use of the Vela precedent. LEXIS SEARCH, Genfed library, Cases file (October 11, 1983).

from even a cursory reading of the panel opinion and it represents a rather unremarkable application of precedent. Under the totality-of-the-circumstances test of ineffectiveness of counsel,[3] the state court exhaustion doctrine is satisfied if: (1) the applicant identifies particular, egregious errors as examples of an overall ineffectiveness; (2) the respondent has the opportunity to go beyond the application to identify incidents of effectiveness; (3) the state court considers these arguments and professes to carry out its own independent analysis of counsel's entire record performance; (4) the state court's findings conclusions and recommendations disclose a thorough state court review of counsel's performance. Therefore, when the state habeas court expressly states that it has reviewed the entire record under a totality-of-the-circumstances test, and the record demonstrates that the state court has in fact done so, the federal habeas court may consider the issue exhausted. Accurately stated, the holding challenged here requires more by way of exhaustion than this Court's decisions. Even the headnote writer understood the narrowness of the holding below. See 708 F.2d at 954 (Headnote 6) (Petition for Writ of Certiorari Appendix B at 3).

Once Petitioner's exaggeration of the holding below is exposed, the overstatement in the petition of the importance of the case becomes obvious. The panel opinion is merely a consistent and correct application of well-worn precedent. In the leading decision, Picard v. Connor, 404 U.S. 270, 278 (1971), this Court held that "the substance of a federal habeas

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[3] Petitioner does not here challenge the Court of Appeals' standard of review of counsel's effectiveness. See Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B En Banc), cert. granted, 103 S. Ct. 2451 (1983). But cf. United States v. Johnson, 457 U.S. 537 (1982) (Retroactivity of constitutional rulings).

corpus claim must first be presented to the state courts." See also id. at 275-76. According to this Court's subsequent decisions and noted commentators, the doctrine of exhaustion requires only that the state courts be provided with a fair opportunity to correct the same claimed constitutional defect later presented to the federal habeas court.[4] Here, the state habeas court actually reached the merits of the ineffectiveness issue and reviewed the entire record along the way to denying state habeas relief. Granting review in this case now would be a wasteful exercise of this Court's discretionary jurisdiction. This Court should resist Petitioner's efforts to obtain a common law writ of error under the certiorari jurisdiction. There is nothing new here. This holding is not "unrealistic" and does not place "a tremendous burden on the state courts" (Petition for Writ of Certiorari at 11).[5] It is consistent with established constitutional analysis for which the state courts are not only very able but duty-bound to perform in our

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[4] E.g., Anderson v. Harless, 103 S.Ct. 276, 277 (1982); Duckworth v. Serrano, 454 U.S. 1, 3 (1981); Smith v. Digmon, 434 U.S. 332, 333 (1975); Pitchess v. Davis, 421 U.S. 482, 487-90 (1975); Smith v. Goguen, 415 U.S. 566, 576-77 (1974). See also generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1489 (1973); J. Cook, Constitutional Rights of the Accused -- Post- Trial Rights 265 (1976); J. Moore, M. Waxner, M. Eisenstein, S. Allen, A. Henschel, B. Lafferty, & S. Katz, 8C Moore's Federal Practice § 14.04 (2d ed. 1982); R. Popper, Post-Conviction Remedies 194-222 (1978); R. Sokol, Federal Habeas Corpus 166-67 (2d ed. 1969); D. Wilkes, Federal and State Postconviction Remedies and Relief 150-54 (1983); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4264 (1978); L. Yackle, Postconviction Remedies 257 (1981).

[5] This case is its own best example. Following the guilty plea, the sentencing phase covers fewer than 300 pages of transcript. It can be read in its entirety in a short time. How else could the state habeas court adjudge the total effectiveness of defense counsel, except by reading the whole of the transcript? As is always true, the adversaries provided briefing guidance for the habeas court's reading of the record. It would be a strange system, indeed, if the writ opponent and the state court could read the entire record to deny relief but the applicant and the federal court could not read the entire record to grant relief.

federal system. Indeed, the exhaustion doctrine itself traditionally has deferred this first appraisal to the state habeas court. To use that doctrine to excuse the state court from reading the transcript would frustrate the policy behind the exhaustion doctrine.[6]

II. THE PROCEDURAL DEFAULT DOCTRINE DOES NOT PROHIBIT A STATE PRISONER FROM URGING HIS DEFENSE COUNSEL WAS INEFFECTIVE, IN PART, BECAUSE COUNSEL'S FAILURE TO OBJECT ADEQUATELY DID NOT PRESERVE THE ERRORS FOR STATE APPEAL AND EXPOSED THE SENTENCING JURY TO "COMPLETELY IRRELEVANT, IMMATERIAL, AND PREJUDICIAL"[7] EVIDENCE AND ARGUMENT CONCERNING THE GOOD CHARACTER OF THE VICTIM

Based on principles of comity and federalism, the procedural default doctrine prevents a federal habeas court from granting relief to a state prisoner on a claim which is unreviewable in state court, unless the federal court finds cause for, and prejudice from, the state court default. E.g., Engle v. Isaac, 456 U.S. 107, 128-29 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977). This doctrine has no application here. Respondent did not, and could not, make a constitutional claim against the admission of the prejudicial

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6 Alternatively, the specific incidents of ineffectiveness which even Petitioner admits were properly presented in the State Court would themselves support the result in the Court of Appeals. The counsel errors concerning evidence of decedent's character were the principal examples relied on to hold counsel's performance ineffective and were the only errors considered by the Court below under the actual and substantial prejudice analysis and under the harmless error analysis. 708 F.2d at 965-66. The exhaustion issue concerned only those instances of substandard performance alleged on appeal which had not been explicitly enumerated in the state court pro se petition. Id. at 958.

7 Vela v. State, 516 S.W. 2d at 179.

evidence of decedent's character. Any such challenge would be solely cognizant in state court under state evidence law and there it was deemed not to have been preserved for review. See Vela v. State, 516 S.W.2d at 178-79. Proceeding under the incorporated sixth amendment, Respondent established defense counsel's overall ineffectiveness and highlighted counsel's serious ineptness concerning the character evidence of decedent which allowed admission and consideration by the jury and frustrated direct appellate review. The Court of Appeals concluded: first, Respondent's right to effective assistance of counsel was violated, second, Respondent's sentencing defense suffered actual and substantial prejudice as a result, and third, the state had failed to carry the burden of showing the error to be harmless. 708 F.2d at 965-66. The Court of Appeals required that Respondent show actual and substantial prejudice to establish the right to counsel violation. The court relied on en banc precedent which thus had brought into symmetry the prejudice prong of the incorporated sixth amendment with the cause and prejudice requirement of federal habeas law. Id. at 965 (citing Washington v. Strickland, 693 F.2d at 1258). See generally Washington v. Strickland, 693 F.2d at 1258, 1260-62 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). Contrary to Petitioner's second argument, "[s]ubstance has been synchronized with procedure." Baker, Criminal Procedure, 34 Mercer L.Rev. 1241, 1269 (1983). See also Tague, The Attempt to Improve Criminal Defense Representation 15 Am. Crim. L.Rev. 109, 128-30 (1977).

Even Petitioner could not ask for more. The procedural default doctrine of habeas corpus law cannot transcend the sixth and fourteenth amendments. Nowhere has Respondent defaulted on the right to counsel issue. Thus exposed, Petitioner's second argument cannot be considered here as appropriate for a writ of certiorari. Cf. Wainwright

v. Sykes, 433 U.S. at, 96 (Stevens, J., concurring); Id. at 99 (White, J., concurring); Id. at 118 (Brennan, J., dissenting); Francis v. Henderson, 425 U.S. 536, 548-49 n.2, 553 n.4 (Brennan, J., dissenting).

CONCLUSION

Petitioner falsely has promised, "There are special and important reasons for granting the writ" (Petition for Certiorari at 8). On the contrary, the reasons why the writ should be denied predominate. The decision below gave full consideration to the exhaustion issue and decided it correctly. The narrow exhaustion issue here simply is not important enough to warrant this Court's attention. The decision below follows a long and unbroken line of authority. This Court's own prior decisions are controlling and Petitioner has shown nothing to warrant a reexamination of settled principles of habeas corpus law. The procedural default issue Petitioner describes is not raised in this case.

For these reasons, the petition for a writ of certiorari should be denied.[7]

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[7] While Respondent urges denial of the petition, one cannot ignore the degree of discretion operative here, the proper exercise of which even the Justices of this Court may disagree on. See, e.g., Anderson v. Harless, 103 S.Ct. 276, 280 (1982) (Stevens, J., dissenting); Boag v. MacDougall, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting). Should this Court decide to perform as a court of errors, Respondent respectfully requests the opportunity to brief and argue the merits beyond the limits of this Brief in Opposition.

Respectfully submitted,

/s/

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On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

MOTION OF RESPONDENT TO PROCEED IN FORMA PAUPERIS

PROOF OF SERVICE

I hereby certify that on the _____ day of October, 1983, one copy of the motion of Respondent to proceed in forma pauperis was mailed, postage prepaid, to Charles A. Palmer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711. All parties required to be served have been served. I am a member of the Bar of this Court.

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SUBSCRIBED AND SWORN TO BEFORE ME this _____ day of October, 1983.

NOTARY PUBLIC in and for
Lubbock County, Texas

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Conrado U. Vela, who is now held in a Texas prison, asks leave to file the attached Brief in Opposition and to proceed in forma pauperis pursuant to Rule 46.1. SUP. CT. R. 46.1.

On October 14, 1982, the Court of Appeals for the Fifth Circuit appointed counsel for Respondent pursuant to the Criminal Justice Act of 1964, as amended. That appointment continues to date. See Rule on the Fifth Circuit Plan Under the Criminal Justice Act at 4. Thus, no affidavit is attached here. See 18 U.S.C. § 3006A(d)(6). Prior leave to proceed in forma pauperis was granted first, on Respondent's state court direct appeal by the Texas Court of Criminal Appeals and, second, in an Order dated November 12, 1981 entered by the United States District Court for the Northern District of Texas.

/s/

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SUBSCRIBED AND SWORN TO BEFORE ME this _____ day of October, 1983.

NOTARY PUBLIC in and for
Lubbock County, Texas